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Supreme Court of the United States

OCTOBER TERM, 1962

No. 561

CHARLES HENRY BEAVER, Petitioner

v.

UNITED STATES OF AMERICA

Petition for Writ of Certiorari to the United States Court of Appeals For the Fourth Circuit

HAYDEN C. COVINGTON
124 Columbia Heights
Brooklyn 1, New York

RICHARD M. WELLING
807 Law Building
Charlotte 2, North Carolina

Counsel for Petitioner

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Supreme Court of the United States

OCTOBER TERM, 1962

No.

CHARLES HENRY BEAVER, Petitioner

v.

UNITED STATES OF AMERICA

Petition for Writ of Certiorari to the United States Court of Appeals For the Fourth Circuit

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TO THE SUPREME COURT OF THE UNITED STATES:

Petitioner prays that a writ of certiorari issue in this case to review the judgment of the United States Court of Appeals for the Fourth Circuit, affirming the judgment of the United States District Court for the Eastern District of North Carolina convicting the petitioner for a violation of the Universal Military Training and Service Act.

OPINION BELOW

The opinion of the Court of Appeals has not yet been reported. It is printed, *infra*, pages 12 to 24, as Appendix A.

JURISDICTION

The judgment of the Court of Appeals was entered on October 3, 1962. See Appendix B, *infra*, page 24.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P. Title 18, Section 3231, U. S. C. confers jurisdiction on the trial court.

QUESTIONS PRESENTED

I.

Whether 50 U. S. C. App. § 456(j), exempting conscientious objectors from participation in combatant and noncombatant military service, prohibited the induction of petitioner when the trial court found that petitioner became a conscientious objector on or before May 9, 1959, prior to the mailing of the order to report for induction on August 25, 1959.

II.

Whether the draft board denied petitioner procedural due process of law by reopening the classification—without reclassification—after issuance of the order to report for induction through mailing to petitioner and permitting him to file a special form for conscientious objector which was thereafter considered without the required formal reopening, as had actually been legally done when the conscientious objector form was mailed to petitioner and allowed to be filed by him.

STATUTE INVOLVED

Section 1(c) of the Universal Military Training and Service Act (50 U. S. C. App. (Supp. V) § 451(c)) provides:

> "The Congress further declares that in a free society the obligations and privileges of serving in the armed forces and the reserve components thereof should be shared generally, in accordance with a system of selection which is fair and just, and which is consistent with the maintenance of an effective national economy."—June 24, 1948, ch. 625, title I, § 1, 62 Stat. 604, amended June 19, 1951, ch. 144, title I, § 1(a) 65 Stat. 75.

Section 6(j) of the act (50 U. S. C. App. (Supp. V) § 456(j), 65 Stat. 75, 83, 86) provides:

> "Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code. Any person claiming exemption from combatant training and service because of such conscientious objections whose claim is sustained by the local board shall, if he is inducted into the armed forces under this title, be assigned to noncombatant service as defined by the President, or shall, if he is found to be conscientiously opposed to participation in such noncombatant service, in lieu of such induction, be ordered by his local board, subject to such regulations as the President may prescribe, to perform for a period equal to the period prescribed

in section 4(b) such civilian work contributing to the maintenance of the national health, safety, or interest as the local board may deem appropriate and any such person who knowingly fails or neglects to obey any such order from his local board shall be deemed, for the purposes of section 12 of this title, to have knowingly failed or neglected to perform a duty required of him under this title."

REGULATION INVOLVED

Section 1625.2 of the Selective Service Regulations (32 C.F.R. §1625.2 [E.O. 10594, 20 F.R. 740, Feb. 3, 1955]) reads as follows:

"*When registrant's classification may be reopened and considered anew.* The local board may reopen and consider anew the classification of a registrant (a) upon the written request of the registrant, the government appeal agent, any person who claims to be a dependent of the registrant, or any person who has on file a written request for the current deferment of the registrant in a case involving occupational deferment, if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; or (b) upon its own motion if such action is based upon the facts not considered when the registrant was classified which, if true, would justify a change in the registrant's classification; *provided, in either event, the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction (SSS Form No. 252) or an Order to Report for Civilian Work and Statement of Employer (SSS Form No. 153) unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances*

over which the registrant had no control." (Emphasis at end of paragraph added.)

STATEMENT OF THE CASE

The Facts

Petitioner registered with his local board on September 14, 1954. When mailed a questionnaire he filled it out and returned it without certifying that he was either a minister or a conscientious objector. [35, 36][1]

He was classified I-A on April 23, 1957. [37] In response to a current information questionnaire he showed unemployment and two dependents on May 14, 1958. [40-41] He was physically examined and found to be acceptable. [42] The local board sent him another questionnaire calling for information on current status August 12, 1959. [46-47] Before this questionnaire was answered the local board mailed to petitioner an order commanding him to report for induction into the armed forces on September 9, 1959. [37, 43]

Petitioner on September 2, 1959, wrote a letter to the local board informing the members of the board: "I am now a minister of Jehovah's Witnesses." [45] He added that this letter, dated August 30, 1959, was in response to the request for current information mailed by the board on August 12, 1959. He said that the letter had been delayed in reaching him because he had moved and it had been addressed to him at a former address which caused the delay in the questionnaire reaching him. He added: "I did not realize until the present that I should have already furnished information that I am now a minister of Jehovah's Witnesses." He continued in the letter with a formal request for a reopening of classification. He requested that the board mail him a Form 150, the special form for conscientious objector. His letter was accom-

[1] Figures appearing herein within brackets refer to the pages of the printed Appendix to Appellant's Brief in the court below.

panied by an affidavit from an official of Jehovah's Witnesses showing that he was an ordained minister and was engaged regularly in the preaching and teaching work of Jehovah's Witnesses. [45, 46]

The local board did not take any action upon the new information immediately. The file was sent to the state headquarters at Charlotte for review and an opinion. [48] State headquarters advised the local board to comply with the request of petitioner and furnish him Form 150, the special form for conscientious objector. The board was then instructed to consider the new evidence and the remainder of the file and to determine whether to reopen. The state director authorized the local board to postpone induction of petitioner "until your October call." [37, 49, 50]

On September 4, 1959, the local board mailed to petitioner the conscientious objector form, which was filed by him on September 14, 1959. [37, 52-57]

The conscientious objector form showed that petitioner was a conscientious objector believing in the Supreme Being, that he opposed participation in warfare and showed that his duty came first to God and then to man. He emphasized that his beliefs had resulted from diligent study of the Bible privately and in congregation meetings of Jehovah's Witnesses, together with attendance at the Theocratic Ministry School since the year 1957. [52-53]

In the conscientious objector form petitioner also showed that he believed in self-defense and emphasized that his ministry and preaching and teaching to others demonstrated the consistency and depth of his religious convictions as a conscientious objector. He added that he had given public expression to his views as a conscientious objector. [53]

This information was followed by a statement of his general background, schooling and employment. He showed that he had participated in only one organization, namely that of Jehovah's Witnesses in Gibsonville, North Carolina. [53-56]

After this conscientious objector form was filed and

from some unknown source, the Selective Service System, acting through the draft board, caused to be placed in the draft board file of petitioner the Selective Service System's bulletin, "Selective Service" for September, 1959, which was adverse to petitioner and done without notice to him. [37]

The local board on September 19, 1959, following the mandate of the adverse Selective Service bulletin above referred to, of which petitioner had no notice, determined that the new evidence submitted did not show a change of status of petitioner resulting from circumstances over which he had no control and thereupon ordered him, by letter, to report for induction on October 1, 1959. [37, 58] He reported on that date and thereafter, October 2, 1959, refused to submit to induction. [37, 60, 61-63] He was thereafter indicted and prosecuted for failure to submit to induction. [2, 67]

Form and History of Action Showing Jurisdiction in Courts Below

This criminal action was begun by indictment returned against the petitioner. [1, 2] It was alleged that, after he registered and was classified, petitioner was ordered to report for induction. It is then alleged that on October 2, 1959, petitioner "knowingly, willfully and feloniously failed, neglected, and refused to be inducted into the military forces as ordered by the Selective Service System, Local Board No. 39, Granville County, Oxford, North Carolina, a duty required of him by the Universal Military Training and Service Act." [2] Petitioner was arraigned and pleaded not guilty. [1] He waived the right of trial by jury. [1]

The court called the case for trial on February 12, 1962. [1, 5] Evidence was received. [5-23] A motion for judgment of acquittal was made. [23-33] The court overruled the motion. An oral opinion was delivered from the bench into the record stating reasons for the order denying the motion for judgment of acquittal. [33-35] The motion was overruled and the court found petitioner guilty. [34-35]

On February 13, 1962, the district court entered a judgment sentencing the petitioner to the custody of the Attorney General for a period of two years. [1, 3] An application for bail was made pending appeal after notice of appeal was filed. This was granted. [1]

REASONS FOR GRANTING THE WRIT

The court below has held that the late conversion of the petitioner to Jehovah's Witnesses was basis in fact for the refusal to reopen. If this Court does not find a conflict with *Schuman* v. *United States*, 208 F. 2d 801 (9th Cir. 1953), then petitioner says there is presented here an important question of federal law which has not been, but which should be, settled by the Court. It is: whether the late conversion of a registrant to a religion that opposes participation in the armed forces of the United States is *per se* basis in fact for the refusal to reopen.

The statute does not freeze the exemption from military service to only those conscientious objectors that are such when they register. The regulations contemplate a change in status after registration. (32 C. F. R. § 1625.2) See also *United States* v. *Vincelli*, 215 F. 2d 210 (2d Cir. 1954), on rehearing, 216 F. 2d 681; *Hull* v. *Stalter*, 151 F. 2d 633 (7th Cir. 1945); *United States* v. *Packer*, 200 F. 2d 540 (2d Cir. 1952), reversed on other grounds, 346 U. S. 1; *United States* v. *Clark*, 105 F. Supp. 613 (W. D. Pa. 1952); *United States* v. *Underwood*, 151 F. Supp. 874 (E. D. Pa. 1955).

Congress had in mind the national policy of freedom of religion which permits the American people to have no religion if they choose none or change religions at their own free will. Surely Congress must have known that some of the 70 million that do not belong to any church would be seeing the light and embracing religion after war

began or after the act went into effect. Certainly Congress must have had in mind the constant proselyting that is going on in this country by over 256 different religions.

There must be something expressed in the act that would compel an interpretation of it as claimed by the court below. The spirit of the act and the history of freedom of religion in this country compel a different construction, especially in the case of conscientious objectors. Proselyting is going on all the time. The New York *Times* (March 25, 1954) carried an account of a change in religions during the last ten years. It showed that 4,144,366 Roman Catholics have become Protestants and 1,071,897 Protestants have become Catholics during the last decade.

Petitioner has no way of knowing the precise number of conscientious objectors that are involved in a situation similar to that in this case. It is estimated that there are a large number of registrants under the law who become conscientious objectors after they register. Because of the above-shown constant large change of religious views by persons in the United States annually and the substantial number of registrants under the law that are becoming conscientious objectors after registration and classification before issuance of orders to report for induction, it makes this case an important case sufficient to justify the granting of certiorari. The two questions involved are important and substantial and should justify this Court in the issuance of the writ of certiorari.

Judge Bell filed a dissenting opinion in this case that eloquently argues the importance and substantiality of the question presented in this petition for writ of certiorari. It would be gilding the lily to add anything to what he said in his dissenting opinion. It is here referred to and made a part hereof as though copied at length herein.

Let us consider now the basis of the opinion of Judge Ganey in *United States* v. *Underwood,* 151 F. Supp. 874 (E. D. Pa. 1955). It is the statute itself which, at the outset of the conscientious objector provision, deprives

the board of jurisdiction to induct one known to be a conscientious objector. The regulation (32 C.F.R. § 1625.2) which provides that no classification can be reopened after the order to report for induction has issued must be construed so as not to apply to a conscientious objector or else be held invalid because in conflict with the act.

It is plain that there is a direct conflict between the regulation and the act. The only way to save the regulation from a declaration of invalidity is by construing the regulation so that a known conscientious objector may not be ordered to be inducted, especially where the forms were all mailed to the registrant and they were filled out. —*United States* v. *Underwood,* 151 F. Supp. 874 (E. D. Pa. 1955).

Section 1625.1(b) of the Selective Service Regulations provides that the registrant must within ten days after "it occurs, report to the local board in writing any fact that might result in the registrant being placed in a different classification." (32 C. F. R. § 1625.1(b)) The ten-day requirement is not mandatory so as to deny a registrant of his rights arising from filing a claim after the ten-day limitation.—*United States* v. *Vincelli,* 215 F. 2d 210 (2d Cir. 1954); on petition for rehearing, 216 F. 2d 681 (2d Cir. 1954).

The Selective Service Regulations are not to be construed strictly against the registrant. (*Berman* v. *Craig,* 207 F. 2d 888, 891 (3rd Cir. 1953); *United States* v. *Greene,* 220 F. 2d 792, 794 (7th Cir. 1955)) A strict construction as invoked by the court below has resulted in the forfeiture of the rights of petitioner in this case.

The dealings between the members of the local board and the registrant should not be in law the same as chess or checkers or some other game of skill or chance. Had the petitioner been educated and up on the regulations he would have known it was to his advantage to report his conscientious objections to the board in May of 1959. His slowness and delay in doing this until after he was

aroused by the issuance to him of the order to report should not be taken as the basis for a forfeiture of his rights. It is true that the order to report for induction according to the regulations limits the local board to a reopening only when there has been a change in circumstances after the issuance of the order that is beyond the control of the registrant.

It would be an unjust forfeiture of petitioner's rights to deny him the right of an appeal to the appeal board on his conscientious objector claim, all of which was contemplated by Congress under the act, through the device of waiver under Section 1625.2 of the regulations.

It is respectfully submitted that the local board should not have refused to reopen solely because the order to report for induction had issued and there were no circumstances over which the petitioner had no control.

CONCLUSION

WHEREFORE, for the reasons above stated, the petition for writ of certiorari should be granted.

Respectfully submitted,

HAYDEN C. COVINGTON
RICHARD M. WELLING
Counsel for Petitioner

October, 1962.

APPENDIX A

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

No. 8572.

UNITED STATES OF AMERICA,

Appellee,

versus

CHARLES HENRY BEAVER,

Appellant.

Appeal from the United States District Court for the Eastern District of North Carolina, at Raleigh. Algernon L. Butler, District Judge.

(Argued May 30, 1962. Decided October 3, 1962.)

Before Bryan and Bell, Circuit Judges and Barksdale, District Judge.

Richard M. Welling (Hayden C. Covington on brief) for Appellant, and Harold W. Gavin, Assistant United States Attorney, (Robert H. Cowen, United States Attorney, on brief) for Appellee.

ALBERT V. BRYAN, Circuit Judge:

Conscientious objector (Jehovah's Witness) Charles Henry Beaver appeals his conviction of refusing to be inducted into the military forces as ordered by his local draft board pursuant to the Universal Military Training and Service Act, 50 U. S. C. App. §§ 451, 462(a). At trial the Court found he had adopted his beliefs some three months before the order for induction or about five years after his registration. Appellant contends this finding proves the invalidity of the order, relying upon 50 U. S. C. App. § 456(j) and alleged administrative faults depriving him of an opportunity to invoke draft exemption. The section reads:

> "Nothing contained in this title [sections 451-454 and 455-471 of this Appendix] shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form . . ."

However, the Court determined—as did the board—that the exemption had not been claimed in the manner required by Selective Service Regulations. Deliberate refusal of induction being admitted, Beaver's conviction followed.

The argument on this appeal is focused on whether the Act's exemption is absolute or is controllable by regulation. Orderly allowance of the exemption, in our opinion, warrants reasonable rules for its invocation. The regulations here pertinent are just; Beaver was confessedly in noncompliance with them, and accordingly was not entitled to exemption. We affirm.

Prescription of "necessary rules and regulations to carry out the provisions" of the Act is therein authorized 50 U. S. C. App. § 460(b) and (c). The authority to promulgate them was vested in the President, and by him delegated to the Director of the Selective Service System. The regula-

tions particularly pertinent in this case are the following, 32 C. F. R.:

1641.3 "*Communication by mail.* It shall be the duty of each registrant to keep his local board advised at all times of the address where mail will reach him . . ."

1625.1 "*Classification not permanent.*

. . .

"(b) Each classified registrant . . . shall, within 10 days after it occurs, report to the local board in writing any fact that might result in the registrant being placed in a different classification . . ."

1625.2 "*When registrant's classification may be reopened and considered anew.* The local board may reopen and consider anew the classification of a registrant (1) upon the written request of the registrant . . . if such request is accompanied by written information presenting facts not considered when the registrant was classified, which, if true, would justify a change in the registrant's classification; . . . provided . . . the *classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction* (SSS Form No. 252), *unless the local board first specifically finds there has been a change in the registrant's status resulting from circumstances over which the registrant had no control.*" (Emphasis supplied)

1625.4 "*Refusal to reopen and consider anew registrant's classification.* When a registrant . . . files with the local board a written request to reopen and consider anew the registrant's classification and the local board is of the opinion that the information accompanying such request fails to present any facts in addition to those considered when the registrant was classified or, even if new facts are presented, the local board is of the opinion that such facts, if true, would not justify a change in such registrant's classification,

it shall not reopen the registrant's classification. In such a case, the local board, by letter, shall advise the person filing the request that the information submitted does not warrant the reopening of the registrant's classification and shall place a copy of the letter in the registrant's file. No other record of the receipt of such a request and the action taken thereon is required."

Appellant registered on September 14, 1954, submitted to a physical examination and on April 23, 1957, was classified I-A. About May 13, 1958, he gave the local board his mailing address as 908 Durham Street, Burlington, North Carolina, doing so on Form NC 26, "Current Information for Local Board."

He moved to Gibsonville, North Carolina in December, 1958, but did not notify the board of the change of address. In fact, he gave no such notice until September 2, 1959, after he had been ordered to report for induction. At trial he admitted awareness of the regulation requiring him to keep the board advised of his mailing address.

Beaver, the Court found, became a minister of Jehovah's Witnesses and a conscientious objector on or about May 9, 1959. Word of his conversion to this belief was not sent the board at any time prior to receipt by him of his order for induction on or about August 26, 1959.

August 12, 1959, the local board sent to appellant by mail to his Burlington address a new current information Form NC 26. This form required an answer on or before August 22, but it was not completed and returned to the board until after the order to report was issued. That order was issued and mailed to Beaver on August 25, directing him to report for induction on September 9, 1959.

Beaver testified that he did not receive the board's communication of August 12, 1959—enclosing the current information request—until after the response date of August 22. On August 31, 1959, having received the order to report dated August 25, Beaver mailed to the local board a letter

in which, disclosing his ministry, he requested a form for conscientious objectors (Form 150) with consequent reopening of his classification, and the right of personal appearance. He asked for a written reply on whether his request to reopen would be granted. Enclosed with his letter was an affidavit as to his clerical status and also the completed "Current Information for Local Board" form. This letter with enclosures was received by the board on September 2, 1959.

In reply, by letter dated September 4, 1959, the local board sent him the conscientious objector form and a form postponing his induction. The letter advised him:

> "The postponement was granted in order for the Board to consider your case at the next board meeting. You will be advised after said meeting if your case is to be reopened. If the Board reopens your case, you will then have the right to personal appearance and appeal. If the case is not reopened, you will be expected to report for induction with our October call."

Meeting September 19, 1959, the board considered the completed conscientious objector form as well as the other papers heretofore mentioned submitted by Beaver, and decided that this evidence, all of which was submitted by Beaver subsequent to the issuance of the order to report for induction, did "not evidence . . . a change in status resulting from circumstances of which he had no control." On that day the board wrote appellant "You are hereby ordered to report . . . October 1, 1959 . . . for induction."

Beaver reported for induction on October 1, 1959, and on the same day the board received a letter from him stating he had written the Presidential Board, Washington, D.C., advising it of "my being a minister and conscientious objector and having not been classified accordingly." On October 2, 1959, he executed a written refusal to be inducted into the armed forces.

I. The fundamental assault of Beaver on his conviction is this: the exemption granted by the Act in § 456(j), supra, contains no limitation upon the time for assertion of the exemption of a conscientious objector, and that consequently Service Regulation 1625.2 cannot override the Act by a stipulation that " . . . the classification of a registrant shall not be reopened after the local board has mailed to such registrant an Order to Report for Induction . . ." While there is some authority to uphold this view—United States v. Underwood, 151 F. Supp. 874 (E.D. Pa. 1955), for example—we agree with Keene v. United States, 266 F. 2d 378, 383 (10 Cir. 1959) that the better view is opposed to these decisions. In our opinion 1625.2 is a fair regulation for the guidance of the board in extending the exemption to registrants. In Keene v. United States, supra, Judge Murrah in speaking for the Court upon the very statute here involved—giving exemption for religious beliefs—epitomized the reasons for our conclusion, 266 F. 2d at 383:

> "Concededly, no one has a constitutional right to exemption from military service. It is a matter of legislative grace . . .
>
> "It does not seem unreasonable or derogatory to the spirit and purpose of the exempting statute to provide by regulation that no request for reopening and reclassification shall be entertained after notice to report for induction is mailed. Otherwise, the whole machinery of the selective service process may conceivably be disrupted by last minute changes in status for purposes of avoidance. Such is the manifest purpose of the proviso in Regulation 1625.2. We think the Regulations have application to a conscientious objector's claim as all other claims for a change in status. It seems also entirely consistent with the procedural safeguards provided in the selective service process to say that the circumstances relied upon to show a change in status must have occurred after the induction notice was mailed. . . ."

Conscientious objector status does not per se excuse the registrant from induction but only from "combatant training and service." The Act may still subject him to induction even if his claim is "sustained by the local board," for "noncombatant service" may be then assigned. Alternately, if he is "conscientiously opposed" to the latter service, he may "be ordered by his local board, subject to such regulations as the President may prescribe" to do such civilian work "as the local board may deem appropriate." That the claim and grant of the exemption were to be pressed and obtained only through a regulated procedure thus appears again from the intent and need manifested in these provisions.

Instantly, Beaver made no effort to pursue his exemption according to the regulations. Concededly well aware of their requirements, he willfully ignored them. Primarily, he failed to give notice of his change of address, precluding prompt receipt of notices from the board. Yet, he relies now in his defense upon his failure to receive the form mailed him on August 12, 1959, asking for current information, until after its cut-off date of August 22, 1959. For this reason, he says he did not complete and return the form before receiving his order to report.

Furthermore, although he embraced his conscientious belief on or before May 9, 1959, he gave the board no word of his persuasion until August 31, 1959, when he mailed the letter requesting reclassification because of his entry into the ministry. If this was too late it was because he left unfulfilled his obligation to advise the board within 10 days of any change in his status. Neither the Board nor the Court had to determine what constitutes "circumstances over which the registrant had no control," because he has never contended his status changed after the issuance of the order to report for induction.

II. Even if Regulation 1625.2 is valid and the ancillary regulations are sustainable, Beaver next asserts, the board has failed to give him a chance to be heard on his claim

under them. Failure of the board to reopen his classification and grant him the right of personal appearance to present his request for the new classification he assigns as a denial of procedural due process.

To begin with, his contention is that the mere mailing to him of the conscientious objector form was a reopening of his classification and gave him the right to be heard at the September 19, 1959, meeting. But the transmittal of the form was only a compliance with Regulation 1621.11 directing the board on request to furnish *any* person claiming to be a conscientious objector with a copy of the appropriate form therefor. It had no effect on the classification. Boyd v. United States, 269 F. 2d 607, 609 (9 Cir. 1959).

Next, Beaver avers that he was entitled to be heard by the board on the issue made by the proviso of Regulation 1625.2, supra, of whether the classification should be reopened, that is, on whether "there has been a change in the registrant's status resulting from circumstances over which the registrant had no control." With this contention we also disagree. The regulations do not provide for a hearing at his stage. The design of the Act leaves to the board, as a preliminary determination on the right to a review, the question whether cause has been shown therefor. In our jurisprudence, this is a familiar concept—as in motions for rehearings and reconsiderations—and we know of no absolute obligation to afford a hearing on the application for them.

Nor has Beaver just ground to complain that he received no notice of the denial of his request for reopening. Regulation 1625.4, supra, does provide for advice to the registrant of any such denial. But we think the order to report mailed to him on September 9, 1959, had the full purport and effect of the notice required by 1625.4.

Again, we think unfounded Beaver's assertion that he was not allowed an appeal from the ruling of September 19, 1959, denying a reopening of his classification. No provision is made in the regulations for an appeal such as

here is sought. In this the appellant has no valid grievance. Klubnikin v. United States, 227 F. 2d 87, 90-91 (9 Cir. 1955), *cert. denied* 350 U. S. 975 (1956); Boyd v. United States, supra, 269 F. 2d 607, 611.

The file of the registrant contained a copy of the Selective Service System's bulletin entitled "Selective Service." In the bulletin was an article referring to the Keene case, supra, holding that a claim of a conscientious objector must be declined if the form therefor is not filed before the issuance of the order to report. Appellant says he had no knowledge of this bulletin or of its notice by the board. Consequently, he argues, it was considered by the board without an opportunity afforded him to answer it. The decision and the bulletin were public records, of which the board and the appellant both could—and should—take notice. It was not evidence withheld from the exemption-seeker as in Brewer v. United States, 211 F. 2d 864 (4 Cir. 1954) cited by the appellant. He has no meritorious objection here.

III. Our opinion is that the board and the District Court were altogether justified in not exempting Beaver. The Congress, in our judgment, did not intend to shield from induction a registrant who in every way flouted the orderly process prescribed by the Selective Service System for the procurement of exemption.

Decisions cited by the appellant are on their facts so different from the circumstances of the present case, that they have no persuasive value to us. E.g., United States v. Vincelli, 215 F. 2d 210 (2 Cir. 1954) *aff'd. on rehearing* 216 F. 2d 681 (which in *dictum* encourages our decision here, 215 F. 2d at 213); and United States v. Packer, 200 F. 2d 540 (2 Cir. 1952), *rev'd. on other grounds* United States v. Nugent, 346 U. S. 1 (1953).

The judgment of the District Court will be affirmed.

Affirmed.

J. SPENCER BELL, Dissenting:

I cannot agree with my colleagues. The command of the statute is clear and precise:

> "Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the Armed Forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. . . ." 50 U. S. C. App. § 456(j) 65 Stat. 75, 83, 86.

The Trial Court's findings of fact are clear and precise on this point:

> "The Court is of the opinion and so finds that the defendant became a minister and a conscientious objector on or before May 9, 1959, prior to the mailing of the Order to Report for Induction on August 25, 1959, . . ."

The Appellant registered on September 14, 1954. He was classified 1-A on April 23, 1957. On August 12, 1959, the Board sent him a current information questionnaire. On August 25, 1959, he was ordered to report for induction on September 9, 1959. On September 2, 1959, the Appellant requested a reopening of his classification and that a Conscientious Objector Form 150 be sent him for filing. The form was properly completed and filed on September 14, 1959. In the interim the Board, acting upon advice of the State Director, postponed the Appellant's induction until its "October call." On September 19, 1959, the Board considered Appellant's case and reached the conclusion that the new evidence submitted did not show a change of status subsequent to his induction notice resulting from circum-

stances over which Appellant had no control. He was ordered to report for induction on October 1, 1959.

I leave to the theologians the intriguing conclusion of both the Board and the Court that the registrant's change of status did not result from circumstances over which the registrant had no control. Obviously, if he in good faith subscribed to his religious objections to military service as early as May 9, 1959, as the Court below found, then the only way he could control his then status was to abnegate his conscientious convictions. It seems to me that it was these very religious convictions which the statute clearly recognized and respected.

I do not believe the regulation (32 C. F. R. § 1625.2) was intended to cover this situation. *Keene* v. *United States*, 266 F. 2d 378 (10 Cir. 1959) is distinguishable because Keene was not a religious objector. To the extent that Keene holds that the Board's revocation of his order to report dated August 25th did not toll the provisions of the regulation prohibiting reconsideration, I must disagree. The Board itself voluntarily set aside its order of August 25, 1959; thus the effective date of registrant's order for induction was September 19, 1959, which was after the change of status took place and after the Board received notice and considered same.

Finally, I think registrant was entitled to be heard on the Board's decision not to reconsider his status. In my view this Appellant's only offense against the regulations was his failure to report his change of status within ten days after it occurred—on this record not later than May 9, 1959. Even this is in some doubt. A reading of Regulation 1625.1(b) with 1625.1(c) could make it apply only to those cases in which a registrant had been given a deferred status. *United States v. Vincelli*, 215 F. 2d 210 (2 Cir. 1954), on petition for rehearing, 216 F. 2d 681 (2 Cir. 1954). These regulations are not to be construed strictly against the registrant. *Berman v.*

Craig, 207 F. 2d 888 at 891 (3 Cir. 1953); *United States v. Greene*, 220 F. 2d 792 at 794 (7 Cir. 1955).

Even if one construes the exemption of the statute as not absolute but controllable by regulation, the regulation to be valid must be reasonable and reasonably applied. If we also assume that Beaver violated a reasonable regulation by failing to advise his local Board of a change of status, I think it unreasonable for the Board to stand on this and deny him reconsideration, in face of the conceded fact that he was a conscientious objector as early as May 9, 1959. At the Board meeting on September 19, when they had all the facts, it was arbitrary to slam the door in his face and refuse the exemption on a narrow and wooden interpretation of the rule about a "change of status," which is of doubtful application anyway. The Board, it seems, was too intent on vindicating the rule, and too indifferent to the substantial rights of the defendant.

The statute gives this man exemption, the Army does not want him, the jail will not change his religious beliefs, nor will the will of the people to fight for their country be sapped by a generous adherence to the philosophy behind this law. *United States v. Underwood*, 151 F. Supp. 874 (E. D. Pa. 1955). See also the language of Mr. Justice Frankfurter's dissent dealing with another aspect of this law.

> "Considering the traditionally high respect that dissent, and particularly religious dissent, has enjoyed in our view of a free society, this Court ought not to reject a construction of Congressional language which assures justice in cases where the sincerity of another's religious convictions is at stake and where prison may be the alternative to an abandonment of conscience. The enemy is not yet so near the gate that we should allow respect for traditions of fairness, which has heretofore prevailed in this country, to be overborne by military

exigencies." United States v. Nugent, 346 U. S. 1 (1952) at page 12.

I would reverse the judgment because the Appellant is clearly within the category of those exempt by the statute.

APPENDIX B

Judgment of Court of Appeals

Appeal from the United States District Court for the Eastern District of North Carolina.

This cause came to be heard on the record from the United States District Court for the Eastern District of North Carolina, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court appealed from, in this case, be, and the same is hereby, affirmed.

October 3rd, 1962.

ALBERT V. BRYAN
United States Circuit Judge.

FILED October 3, 1962